

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GARY F. HERRIN, )  
Plaintiff, ) No. CV-10-54-JPH  
v. ) ORDER GRANTING DEFENDANT'S  
MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
of Social Security, )  
Defendant. )

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on February 11, 2011 (Ct. Rec. 13, 15). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Commissioner). Plaintiff replied on January 31, 2011 (Ct. Rec. 17). The parties have consented to proceed before a magistrate judge (Ct. Rec. 8). After reviewing the administrative record and the briefs filed by the parties, the court **grants** Defendant's Motion for Summary Judgment (Ct. Rec. 15) and **denies** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

## JURISDICTION

Plaintiff concurrently filed applications for disability insurance benefits (DIB) and supplemental security income (SSI) on December 12, 2006, alleging disability as of December 2, 2005 (Tr. 67, 105-107, 108-111). The applications were denied initially and on reconsideration (Tr. 80-83, 85-88).

ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

1 At a hearing before Administrative Law Judge (ALJ) Robert  
2 Chester on July 16, 2008, plaintiff, represented by counsel, and a  
3 vocational expert testified (Tr. 24-57). On August 20, 2008, the  
4 ALJ issued a partially favorable decision finding plaintiff  
5 disabled for the closed period of December 2, 2005, through  
6 September 25, 2007, but not thereafter (Tr. 74-75,78-79). The  
7 Appeals Council denied Mr. Herrin's request for review on January  
8 15, 2010 (Tr. 1-4). Therefore, the ALJ's decision became the final  
9 decision of the Commissioner, which is appealable to the district  
10 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action  
11 for judicial review pursuant to 42 U.S.C. § 405(g) on March 5,  
12 2010 (Ct. Rec. 1,4).

## STATEMENT OF FACTS

14 The facts have been presented in the administrative hearing  
15 transcript, the ALJ's decision, the briefs of both plaintiff and  
16 the Commissioner, and are briefly summarized here.

17 Plaintiff was 46 years old at onset and 49 at the hearing  
18 (Tr. 28, 73). He has a high school education and earned a  
19 certificate in construction management after completing a two year  
20 course at California Polytechnic University (Tr. 31, 127). Mr.  
21 Herrin has worked as a construction project manager, outside  
22 delivery driver, parts salesperson, and recreation supervisor (Tr.  
23 32-37, 49-50, 123). He is unmarried and lives with his mother (Tr.  
24 30).

25 Plaintiff cannot work because his right foot is "always  
26 swelling up and hurting." He quit physical therapy because the  
27 physical therapist was not showing up for the appointments (Tr.  
28 39). Mr. Herrin testified he does not really have a good reason

1 for failing to follow up with treatment provider Eugene G.  
2 Pontecorvo, M.D., after February 2007 (Tr. 41-42).

3 Plaintiff testified he did not take any prescribed  
4 medication; wears a hiking boot style orthopedic shoe in the  
5 winter and takes ibuprofen occasionally, both of which help  
6 alleviate foot pain (Tr. 25, 29-30, 41-42), and walks with a limp  
7 (Tr. 45). Activities include laundry, cooking, driving, shopping,  
8 yard work, visiting neighbors, and fishing two or three times a  
9 week (Tr. 30-31, 43, 46, 131-133). Mr. Herrin can sit for 30 minutes,  
10 walk for fifteen minutes, and stand for fifteen to twenty minutes  
11 (Tr. 44-45). He frequently elevates his foot throughout the day,  
12 from 30 to 90 minutes at a time, to relieve swelling (Tr. 45).

13 **SEQUENTIAL EVALUATION PROCESS**

14 The Social Security Act (the Act) defines disability  
15 as the "inability to engage in any substantial gainful activity by  
16 reason of any medically determinable physical or mental impairment  
17 which can be expected to result in death or which has lasted or  
18 can be expected to last for a continuous period of not less than  
19 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
20 also provides that a Plaintiff shall be determined to be under a  
21 disability only if any impairments are of such severity that a  
22 plaintiff is not only unable to do previous work but cannot,  
23 considering plaintiff's age, education and work experiences,  
24 engage in any other substantial gainful work which exists in the  
25 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
26 Thus, the definition of disability consists of both medical and  
27 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
28 (9<sup>th</sup> Cir. 2001).

1       The Commissioner has established a five-step sequential  
2 evaluation process for determining whether a person is disabled.  
3 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
4 is engaged in substantial gainful activities. If so, benefits are  
5 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
6 the decision maker proceeds to step two, which determines whether  
7 plaintiff has a medically severe impairment or combination of  
8 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

9       If plaintiff does not have a severe impairment or combination  
10 of impairments, the disability claim is denied. If the impairment  
11 is severe, the evaluation proceeds to the third step, which  
12 compares plaintiff's impairment with a number of listed  
13 impairments acknowledged by the Commissioner to be so severe as to  
14 preclude substantial gainful activity. 20 C.F.R. §§  
15 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
16 App. 1. If the impairment meets or equals one of the listed  
17 impairments, plaintiff is conclusively presumed to be disabled.  
18 If the impairment is not one conclusively presumed to be  
19 disabling, the evaluation proceeds to the fourth step, which  
20 determines whether the impairment prevents plaintiff from  
21 performing work which was performed in the past. If a plaintiff is  
22 able to perform previous work, that Plaintiff is deemed not  
23 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
24 this step, plaintiff's residual functional capacity (RFC)  
25 assessment is considered. If plaintiff cannot perform this work,  
the fifth and final step in the process determines whether  
plaintiff is able to perform other work in the national economy in  
view of plaintiff's residual functional capacity, age, education

1 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
 2 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

3 The initial burden of proof rests upon plaintiff to establish  
 4 a *prima facie* case of entitlement to disability benefits.

5 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
 6 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
 7 met once plaintiff establishes that a physical or mental  
 8 impairment prevents the performance of previous work. The burden  
 9 then shifts, at step five, to the Commissioner to show that (1)  
 10 plaintiff can perform other substantial gainful activity and (2) a  
 11 "significant number of jobs exist in the national economy" which  
 12 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
 13 Cir. 1984).

#### 14 STANDARD OF REVIEW

15 Congress has provided a limited scope of judicial review of a  
 16 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
 17 the Commissioner's decision, made through an ALJ, when the  
 18 determination is not based on legal error and is supported by  
 19 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
 20 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
 21 "The [Commissioner's] determination that a plaintiff is not  
 22 disabled will be upheld if the findings of fact are supported by  
 23 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
 24 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
 25 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
 26 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.

27 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 28 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

1 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 2 evidence as a reasonable mind might accept as adequate to support  
 3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 4 (citations omitted). "[S]uch inferences and conclusions as the  
 5 [Commissioner] may reasonably draw from the evidence" will also be  
 6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
 7 review, the Court considers the record as a whole, not just the  
 8 evidence supporting the decision of the Commissioner. *Weetman v.*  
 9 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
 10 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to  
 12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
 13 evidence supports more than one rational interpretation, the Court  
 14 may not substitute its judgment for that of the Commissioner.  
 15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
 16 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
 17 evidence will still be set aside if the proper legal standards  
 18 were not applied in weighing the evidence and making the decision.  
 19 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,  
 20 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
 21 support the administrative findings, or if there is conflicting  
 22 evidence that will support a finding of either disability or  
 23 nondisability, the finding of the Commissioner is conclusive.  
 24 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

25 **ALJ'S FINDINGS**

26 At the outset, the ALJ found plaintiff met DIB insurance  
 27 requirements through December 31, 2007 (Tr. 67,71). At step one,  
 28 the ALJ found plaintiff did not engage in substantial gainful

1 activity after onset (Tr. 71). At steps two and three, he found  
 2 Mr. Herrin suffers from a fractured heel<sup>1</sup>, an impairment that is  
 3 severe but does not alone meet or medically equal a Listed  
 4 impairment (Tr. 71). At steps four and five, he found plaintiff  
 5 was unable to perform past work, or any work, from December 2,  
 6 2005 through September 25, 2007. He found plaintiff disabled for  
 7 this closed period.

8 The ALJ found plaintiff less than completely credible (Tr.  
 9 76). He also found plaintiff's medical condition improved. At step  
 10 four, relying on the VE, the ALJ found as of September 26, 2007,  
 11 plaintiff's RFC for a range of light work enabled him to perform  
 12 past relevant work. These jobs included construction project  
 13 manager, outside delivery driver, and parts salesperson (Tr.  
 14 52,78). Accordingly, the ALJ found that as of September 26, 2007,  
 15 plaintiff was not disabled as defined by the Social Security Act  
 16 (Tr. 79).

## 17 ISSUES

18 Plaintiff alleges the Commissioner erred when he found Mr.  
 19 Herrin's medical condition had improved by September 26, 2007. Mr.  
 20 Herrin alleges his medical condition worsened. Second, plaintiff  
 21 alleges the ALJ's credibility assessment is flawed. Last, he  
 22 asserts the court should reverse the ALJ's decision based on new  
 23 evidence submitted to the Appeals Council, but not to the ALJ (Ct.

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24  
 25 <sup>1</sup>Plaintiff fell from a ladder in December 2005 and fractured  
 26 his right heel. Tests showed he suffered a "complex comminuted  
 27 compression type calcaneal fracture" (Tr. 72, 173-174, 176). On  
 28 December 21, 2005, Brian Padra, M.D., performed an open  
 reduction, internal fixation surgery to repair the fracture (Tr.  
 180).

1 14 at 8, 10-11). According to the Commissioner, the ALJ  
 2 appropriately weighed the evidence and assessed credibility, and  
 3 the medical reports admitted by the Appeals Council do not  
 4 necessitate remand. The Commissioner asks the Court to affirm (Ct.  
 5 Rec. 16 at 5-11).

6 **DISCUSSION**

7 **A. Weighing medical evidence**

8 In social security proceedings, the claimant must prove the  
 9 existence of a physical or mental impairment by providing medical  
 10 evidence consisting of signs, symptoms, and laboratory findings;  
 11 the claimant's own statement of symptoms alone will not suffice.  
 12 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
 13 on the basis of a medically determinable impairment which can be  
 14 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
 15 medical evidence of an underlying impairment has been shown,  
 16 medical findings are not required to support the alleged severity  
 17 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
 18 1991).

19 A treating physician's opinion is given special weight  
 20 because of familiarity with the claimant and the claimant's  
 21 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
 22 1989). However, the treating physician's opinion is not  
 23 "necessarily conclusive as to either a physical condition or the  
 24 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
 25 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
 26 treating physician than an examining physician. *Lester v. Chater*,  
 27 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
 28 given to the opinions of treating and examining physicians than to

1 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
2 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
3 are not contradicted, they can be rejected only with clear and  
4 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
5 ALJ may reject an opinion if he states specific, legitimate  
6 reasons that are supported by substantial evidence. See *Flaten v.*  
7 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
8 1995).

9 In addition to the testimony of a nonexamining medical  
10 advisor, the ALJ must have other evidence to support a decision to  
11 reject the opinion of a treating physician, such as laboratory  
12 test results, contrary reports from examining physicians, and  
13 testimony from the claimant that was inconsistent with the  
14 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
15 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
16 Cir. 1995).

17 Plaintiff contends that the ALJ failed to properly credit the  
18 September 25, 2007, opinion of examining doctor Edmund W. Gray,  
19 M.D. (Ct. Rec. 14 at 10-11).

20 As noted, plaintiff underwent foot surgery on December 21,  
21 2005 (Tr. 180). On January 4, 2006, treating surgeon Dr. Padrt  
22 referred Mr. Herrin for physical therapy (Tr. 191). By February 8,  
23 2006, plaintiff was able to wear a regular shoe (Tr. 192). Less  
24 than three months after surgery, on March 8, 2006, Dr. Padrt  
25 opined plaintiff was severely limited and unable to perform six  
26 basic work-related activities (Tr. 187), but should be reevaluated  
27 for returning to work on March 20, 2006 (Tr. 188). On March 20,  
28 2006, he opined it "is not uncommon for this to take up to a year

1 or so to get back to as much function as can be expected." Dr.  
 2 Padrta did not foresee plaintiff returning to heavy labor jobs  
 3 with this injury, and "[h]e [plaintiff] will try to make  
 4 arrangements regarding that" (Tr. 193).

5 On December 19, 2006, treating physician Pontecorvo observed  
 6 some atrophy. He prescribed shoe modification (Tr. 196). In  
 7 January 2007, he diagnosed subtalar arthritis and advised  
 8 plaintiff the condition is usually treated with subtalar fusion  
 9 when it becomes "sufficiently symptomatic" (Tr. 195). On February  
 10 21, 2007, Dr. Pontecorvo observes it has been more than a year  
 11 since surgery (Tr. 194). He suspects the hardware may be causing  
 12 pain that could be alleviated with removal. As a first measure,  
 13 however, the doctor again prescribed shoe modification. He notes  
 14 if this does not work, plaintiff should then consider having the  
 15 hardware removed or undergoing subtalar joint fusion (Tr. 194).

16 On September 25, 2007, Dr. Gray re-evaluated plaintiff. He  
 17 notes plaintiff's only present skill is "in the heavy labor  
 18 market" (Tr. 215). When Dr. Gray last saw plaintiff in 2006, he  
 19 recommended Mr. Herrin work toward vocational rehabilitation. In  
 20 2007, Dr. Gray points out this has not been done.

21 Dr. Gray notes plaintiff is not using cushioning as  
 22 recommended by Dr. Pontecorvo, and he has failed to follow up with  
 23 him [Dr. Pontecorvo]. On exam, the doctor states plaintiff's range  
 24 of motion of the ankle and back are within normal limits; so is  
 25 the heel and toe walking test. He observes there is no muscle  
 26 atrophy (Tr. 215). After opining plaintiff should cooperate with  
 27 Dr. Pontecorvo's recommendations, Dr. Gray states

28 Since injuries of this nature have a tendency to  
 slowly worsen with the aging process, it may be close

1 to the last chance that this gentleman has of getting  
 2 back to work vs. a permanent impairment that would make  
 3 it difficult for him to get back to work even though  
 4 technically he might be able to do that."

5 (Tr. 216).

6 To further aid in weighing the conflicting medical evidence,  
 7 the ALJ evaluated plaintiff's credibility and found him less than  
 8 fully credible (Tr. 76-77). Credibility determinations bear on  
 9 evaluations of medical evidence when an ALJ is presented with  
 10 conflicting medical opinions or inconsistency between a claimant's  
 11 subjective complaints and diagnosed condition. See *Webb v.*  
 12 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

13 It is the province of the ALJ to make credibility  
 14 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
 15 1995). However, the ALJ's findings must be supported by specific  
 16 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
 17 1990). Once the claimant produces medical evidence of an  
 18 underlying medical impairment, the ALJ may not discredit testimony  
 19 as to the severity of an impairment because it is unsupported by  
 20 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
 21 1998). Absent affirmative evidence of malingering, the ALJ's  
 22 reasons for rejecting the claimant's testimony must be "clear and  
 23 convincing." *Lester v. Chater*, 81 F.3d at 834. "General findings  
 24 are insufficient: rather the ALJ must identify what testimony not  
 25 credible and what evidence undermines the claimant's complaints."  
*Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

26 The ALJ relied on several factors when he assessed  
 27 credibility: inconsistent statements, failure to follow  
 28 recommended courses of treatment, and activities inconsistent with  
 the degree of impairment alleged (Tr. 75-77).

1       *Inconsistent statements.* Plaintiff complained he lost muscle  
 2 tone. The ALJ accurately observes Dr. Gray's 2007 report states  
 3 there are *no signs of atrophy* (Tr. 76, citing Ex. 7F/5). Plaintiff  
 4 testified he stopped going to physical therapy because the  
 5 therapist failed to show up for two appointments. Physical therapy  
 6 records show it was Mr. Herrin who missed appointments. In  
 7 addition, he failed to contact the therapist from March to April  
 8 2006. When he did attend physical therapy, plaintiff admitted he  
 9 was not complying with the home exercise program (Tr. 76, 227-  
 10 228).

11       *Unexplained failure to follow medical advice.* In February  
 12 2007, Dr. Pontecorvo prescribed orthopedic shoes and explained if  
 13 this did not alleviate plaintiff's pain, the hardware in his foot  
 14 could be surgically removed (Tr. 76, Ex. 5F/1). Seven months  
 15 later, in September 2007, Dr. Gray notes plaintiff used no cushion  
 16 when walking, had not reported back to Dr. Pontecorvo, and "the  
 17 testing to have special shoes [made] had not been done" (Tr. 76,  
 18 Ex. 7F/5). The ALJ points out plaintiff testified he had no good  
 19 reason for failing to follow up with Dr. Pontecorvo.

20       *Daily activities.* Plaintiff's activities include mowing the  
 21 lawn, grocery shopping, laundry, cooking, fishing several times a  
 22 week, walking, and driving (Tr. 77, Ex. 3E).

23       The ALJ's reasons for finding plaintiff less than fully  
 24 credible are clear, convincing, and fully supported by the record.  
 25 See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir.  
 26 2002)(proper factors include inconsistencies in plaintiff's  
 27 statements, inconsistencies between statements and conduct, and  
 28 extent of daily activities). Noncompliance with medical care or

1 unexplained or inadequately explained reasons for failing to seek  
2 medical treatment also cast doubt on a claimant's subjective  
3 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
4 2d 597, 603 (9<sup>th</sup> Cir. 1989).

5 The ALJ rejected some of Dr. Gray's September 2007 opinions  
6 because objective evidence in the same report shows considerable  
7 improvement in plaintiff's condition since November of 2006, the  
8 time of Dr. Gray's initial evaluation. Second, citing plaintiff's  
9 age and lack of vocational rehabilitation, Dr. Gray did not lower  
10 Mr. Herrin's severity rating to moderately impaired (Tr. 78,  
11 referring to Ex. 7F/1-6). The ALJ observes Dr. Gray prepared his  
12 report for the Department of Social and Health Services, an agency  
13 governed by different rules and guidelines than the SSA. *Id.*

14 The ALJ's reasons for rejecting some of the examining  
15 doctor's contradicted opinions are specific, legitimate and  
16 supported by substantial evidence. See *Lester*, 81 F.3d at 821. The  
17 ALJ is correct that plaintiff's lack of vocational rehabilitation  
18 is immaterial to the RFC assessment (Tr. 78). He is also correct  
19 Dr. Gray's objective examination results do not support his  
20 assessment that plaintiff suffers "significant interference with  
21 the ability to perform work activities" (Tr. 78, 211-216). An ALJ  
22 is not required to credit an opinion that is conclusory, brief,  
23 and unsupported by clinical findings. *Matney v. Sullivan*, 981 F.2d  
24 1016, 1019 99<sup>th</sup> Cir. 1992).

25 The ALJ is responsible for reviewing the evidence and  
26 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
27 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
28 trier of fact, not this court, to resolve conflicts in evidence.

1 *Richardson*, 402 U.S. at 400. The court has a limited role in  
 2 determining whether the ALJ's decision is supported by substantial  
 3 evidence and may not substitute its own judgment for that of the  
 4 ALJ, even if it might justifiably have reached a different result  
 5 upon de novo review. 42 U.S.C. § 405 (g).

6 The ALJ's assessment of the evidence, including credibility,  
 7 is both legally and factually supported.

8 **B. Appeals Council evidence**

9 The ALJ filed his decision on August 20, 2008 (Tr. 79).  
 10 Plaintiff alleges the decision should be reversed based on  
 11 evidence received by the Appeals Council after the ALJ's decision  
 12 (Ct. Rec. 14 at 11-12). The evidence includes medical reports  
 13 dated September 9 and 25, 2008; October 29, 2008; November 11, 17  
 14 and 25, 2008, and December 2, 2008 (Tr. 8-18, 20-21).

15 Plaintiff's brief states:

16 "The regulations regarding review by the Appeals Council  
 17 provide: If new and material evidence is submitted, the Appeals  
 18 Council shall consider the additional evidence *only where it*  
 19 *relates to the period on or before the date of the [ALJ] hearing*  
 20 *decision*. The Appeals Council shall evaluate the entire record,  
 21 including the new and material evidence submitted *if it relates to*  
 22 *the period on or before the date of the [ALJ's] hearing decision*.  
 23 20 CFR §§ 404.970(b), 416.1470(b)."

24 (Ct. Rec. 14 at 11)(italics supplied).

25 The evidence submitted after the hearing does not relate to  
 26 the period on or before the ALJ's decision.

27 This court has jurisdiction to remand matters on appeal for  
 28 consideration of newly discovered evidence. *Goerg v. Schweiker*,

1 643 F.2d 582, 584 (9<sup>th</sup> Cir. 1981); 42 U.S.C. § 405(g). Section  
 2 405(g) expressly provides for remand where new evidence is  
 3 "material" and there is "good cause" for the failure to  
 4 incorporate the evidence in a prior proceeding. *Burton v. Heckler*,  
 5 724 F.2d 1415, 1417 (9<sup>th</sup> Cir. 1984). To be material, the new  
 6 evidence must bear directly and substantially on the matter in  
 7 issue. *Key v. Heckler*, 754 F.2d 1545, 1551 (9<sup>th</sup> Cir. 1985). Also,  
 8 there must be a reasonable possibility that the new evidence would  
 9 have changed the outcome if it had been before the Secretary. *Booz*  
 10 *v. Secretary of Health and Human Services*, 734 F.2d 1378, 1380-  
 11 1381 (9<sup>th</sup> Cir. 1984).

12 First, the new evidence is not material. The records  
 13 submitted are immaterial because they do not address plaintiff's  
 14 medical status during the relevant period at issue in this action.  
 15 Second, plaintiff offers no reason why information from these  
 16 providers was not solicited earlier. This is not "good cause."  
 17 See, e.g., *Allen v. Secretary of Health and Human Services*, 726  
 18 F.2d 1470, 1473 (9<sup>th</sup> Cir. 1984)(seeking out a new success with the  
 19 agency does not establish "good cause"). Since plaintiff fails to  
 20 meet the materiality and good cause requirements, the court is not  
 21 able to consider the newly submitted evidence. If plaintiff's  
 22 condition has worsened, he may file a new application.

23 The ALJ's assessment of the medical evidence and plaintiff's  
 24 credibility are supported by the record and free of legal error.  
 25 The new evidence submitted to the Appeals Council after the  
 26 hearing is immaterial.

27 **CONCLUSION**

28 Having reviewed the record and the ALJ's conclusions, this

1 court finds that the ALJ's decision is free of legal error and  
2 supported by substantial evidence..

3 **IT IS ORDERED:**

4 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is  
5 **GRANTED.**

6 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
7 **DENIED.**

8 The District Court Executive is directed to file this Order,  
9 provide copies to counsel for Plaintiff and Defendant, enter  
10 judgment in favor of Defendant, and **CLOSE** this file.

11 DATED this 11th day of February, 2011.

12 s/ James P. Hutton  
13 JAMES P. HUTTON  
14 UNITED STATES MAGISTRATE JUDGE

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